

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2651

Cir. Ct. No. 2008CF242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH W. GOLDEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County:
JAMES C. BABLER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Kenneth Golden, pro se, appeals an order denying without a hearing his third motion for post-conviction relief. We conclude the arguments set forth in that motion have already been litigated, are procedurally barred, or lack merit. Accordingly, we affirm.

BACKGROUND

¶2 Golden was convicted upon guilty pleas of two counts of sexual assault of a child under the age of thirteen. The victims were his two step-granddaughters. Golden’s adult step-daughter testified on Golden’s behalf at the sentencing hearing, stating that even though Golden had also abused her as a minor, he was generally a “good man” in need of counseling. Golden was ultimately given consecutive sentences totaling twelve years of initial confinement and twenty-eight years of extended supervision. The judgment of conviction was entered on May 8, 2009. Golden filed a notice of intent to pursue post-conviction relief on May 18, 2009.

¶3 On March 1, 2011, Golden filed a motion in this court requesting an extension of time to file a direct appeal. We construed this as a request to extend the time for the state public defender to appoint counsel and order transcripts, and extended the time to complete those tasks to April 11.¹ Golden then requested a stay of appellate proceedings and time limits. We denied that motion in an order dated March 18, 2011. On March 24, the public defender declined to appoint counsel because Golden was not indigent. The April 11, 2011 deadline passed without Golden requesting transcripts or any further extensions of time.

¶4 Golden, pro se, filed his first post-conviction motion on May 16, 2011. In it, he argued one of the victims was not entitled to restitution, and the

¹ We ordered a thirty-day extension from the date of our order, March 11, 2011. Because the thirtieth day fell on Sunday, April 10, the deadline would have been April 11, 2011, by operation of WIS. STAT. § 801.15(1)(b).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court lacked authority to order restitution until his direct appeal was completed. Golden represented that his direct appeal was currently in the post-conviction stage and a brief would be filed within thirty days. The circuit court denied this first motion.

¶5 On June 17, 2011, Golden, still pro se, filed his second post-conviction motion. He argued his trial counsel was ineffective based on a conflict of interest.² He also argued his sentence was based on inaccurate information: namely, his adult step-daughter's abuse allegation. The circuit court concluded Golden failed to establish an actual conflict of interest, but ordered a *Machner* hearing to determine whether "his attorney was ineffective for failure to dispel false information" at sentencing.³

¶6 Golden was represented by court-appointed post-conviction counsel at the *Machner* hearing. Both Golden and trial counsel testified. At the conclusion of the hearing, the court found credible trial counsel's testimony that Golden knew of his step-daughter's allegation prior to sentencing, and did not tell trial counsel it was false. Further, it found that Golden demanded that his step-daughter testify at sentencing against the documented advice of trial counsel.

² Golden claimed that trial counsel essentially threw his case by providing inadequate or faulty advice based on the fact that the district attorney was her former co-worker. He also claimed the prosecutor was obligated to disclose this former contact.

³ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The court denied Golden's second post-conviction motion, and no appeal was filed.⁴

¶7 Golden filed his third post-conviction motion, which is the subject of this appeal, on October 1, 2012. Golden again claimed trial counsel was ineffective for failing to object to inaccurate information at sentencing in the form of his step-daughter's abuse allegation. He also asserted that two psychological reports from Project Pathfinder constituted a new factor, and trial counsel was ineffective for not presenting them at sentencing. Finally, the conclusion of Golden's motion briefly suggested that post-conviction counsel was ineffective for failing to raise those issues.

¶8 The circuit court denied Golden's third post-conviction motion without a hearing. It rejected Golden's claim of ineffective assistance of trial counsel because it had already determined that Golden "put [his step-daughter] on the stand contrary to [counsel's] advice." It concluded that Golden's new factor and ineffective assistance arguments based on the Project Pathfinder documents could have been raised sooner and were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Finally, it concluded Golden had failed to

⁴ Golden filed a motion to extend the time for filing a notice of appeal to allow the circuit court to rule on his motion for reconsideration. On April 30, 2012, we observed that according to CCAP records, no motion for reconsideration was pending, and stated that it was not clear that the appeal was controlled by WIS. STAT. RULE 809.30. Either way, we determined Golden was not entitled to an extension because RULE 809.30 does not authorize a motion for reconsideration, and, if that statute did not apply, the time for filing a notice of appeal cannot be extended under WIS. STAT. RULE 809.82(2)(b).

Nonetheless, it appears Golden filed a motion for reconsideration on April 3, 2012, alleging that post-conviction counsel was ineffective and the court erred in determining that trial counsel was not ineffective. The circuit court concluded Golden was not entitled to an evidentiary hearing on these claims and denied his motion.

raise sufficient facts to require a *Machner* hearing regarding the effectiveness of post-conviction counsel. The court noted post-conviction counsel had been appointed by the court “to represent the defendant on the narrow issue of the allegations that [trial counsel] was ineffective for calling the previous victim as a witness at the sentencing hearing.”

DISCUSSION

¶9 On appeal, Golden again seeks relief based on his trial attorney’s failure to object to his step-daughter’s supposedly inaccurate testimony regarding prior sexual assaults. He also argues trial counsel was ineffective for failing to present the Project Pathfinder reports at sentencing, and asserts those reports constitute a new factor entitling him to sentence modification. Finally, he claims post-conviction counsel was ineffective for failing to raise the preceding issues.

¶10 Golden’s claim that his trial attorney was ineffective for failing to object at sentencing to his stepdaughter’s sexual abuse allegation has already been litigated. Golden advanced the same claim in his second post-conviction motion. The circuit court held a *Machner* hearing on the issue and concluded no false information was presented and trial counsel was not deficient. Golden did not appeal. He is not permitted to raise the issue again. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may

not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”⁵

¶11 Golden’s new factor and ineffective assistance arguments regarding the Project Pathfinder documents cannot be considered. *Escalona-Naranjo* construed WIS. STAT. § 974.06(4) to require that all grounds regarding post-conviction relief be raised in an original, supplemental, or amended motion. *Escalona-Naranjo*, 185 Wis. 2d at 185. “Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.” *Id.* The Project Pathfinder documents were the product of pre-sentence psychological testing. The circuit court correctly determined that Golden could have raised these issues in his first post-conviction motion. The issues are now barred.

¶12 Golden has not demonstrated a sufficient reason for his failure to raise these arguments in his first post-conviction motion. He suggests that he received ineffective assistance from post-conviction counsel. However, post-conviction counsel was appointed only to represent him in connection with his second post-conviction motion, and then on the narrow issue of whether trial counsel was ineffective for eliciting his step-daughter’s testimony at sentencing.

⁵ Golden argues the circuit court ruled on a different issue than the one at hand. He claims the court earlier decided that trial counsel was not ineffective for calling his step-daughter as a witness, whereas here he claims counsel should have objected to the information given by the witness “because nothing was ever substantiated.” This is precisely the type of artful rephrasing foreclosed by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Golden’s earlier motion was unsuccessful because the circuit court found that both Golden and trial counsel knew of the sexual abuse allegation, which Golden did not dispute. Golden nevertheless decided to call his step-daughter as a witness, against counsel’s advice. Counsel was not ineffective for failing to object to testimony that the defendant knew would be prejudicial but nonetheless decided to elicit against the advice of counsel.

Post-conviction counsel had nothing to do with the arguments set forth in Golden's first post-conviction motion.

¶13 Finally, we consider Golden's claim that he received ineffective assistance of post-conviction counsel in connection with his second post-conviction motion. We do not reach the merits of this claim because Golden incorrectly assumes that the right to counsel attaches in a collateral proceeding. "Defendants do not have a constitutional right to counsel when mounting collateral attacks upon their convictions" *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998). Because an ineffective assistance of counsel claim is premised upon the right to counsel, *see Strickland v. Washington*, 466 U.S. 668, 686 (1984), it follows that there is no right to effective assistance of counsel in a collateral context.

¶14 Golden suggests that his second post-conviction motion should be construed as a direct appeal. Motions for post-conviction relief and appeals from a judgment of conviction must follow the procedures outlined in WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. Among other things, RULE 809.30 requires a person not represented by the public defender to request a transcript of the reporter's notes within thirty days after filing the notice of intent to pursue post-conviction relief. *See* WIS. STAT. RULE 809.30(2)(f).⁶ The record indicates Golden did not request transcripts within thirty days of filing his notice of intent. He also did not request transcripts before this court's time extension expired on

⁶ WISCONSIN STAT. RULE 809.30(2)(f) applies to a defendant whose notice of intent to pursue post-conviction relief does not request the state public defender to appoint counsel. *See also* WIS. STAT. RULE 809.30(2)(b)5. Golden's notice did not request that counsel be appointed.

April 11, 2011. Consequently, we must construe his second post-conviction motion as a collateral attack under WIS. STAT. § 974.06.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

